

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

RECEIVED

January 19, 2005

2005 JAN 19 PM 2:06

IN RE: Petition of King's Chapel Capacity,)
LLC for Certificate of Convenience and)
Necessity to Serve an Area in Williamson,)
County, Tennessee Known as Ashby Community)

T.R.A. DOCKET ROOM

Docket No. 04-00335

**RESPONSE OF TENNESSEE WASTEWATER SYSTEMS IN OPPOSITION TO
THE PETITION OF APPEAL**

Tennessee Wastewater Systems, Inc. ("TWS") submits the following response to the "Petition for Appeal" filed by King's Chapel Capacity, LLC ("King's Chapel"). The appeal asks the Authority to overturn the decision of Hearing Officer Jean Stone to hold these proceedings in abeyance pending the outcome of two related cases both involving TWS and King's Chapel which are now under way in Williamson County Chancery Court and before the Tennessee Department of Environment and Conservation ("TDEC").

TWS supports the Hearing Officer's conclusion that the TRA cannot move forward on this application for a certificate of convenience and necessity filed by King's Chapel until the Chancery Court and TDEC have decided the issues before them. Moreover, since the Hearing Officer's decision to delay this matter is not an "Initial Order," but merely an interim ruling on a procedural motion, King's Chapel has no right under the Tennessee Uniform Administrative Procedures Act to bring this interlocutory appeal.

Background

The facts surrounding this unusual proceeding are fully set forth in the Hearing Officer's two orders, one issued December 17, 2004, granting the motion of TWS to hold these

proceedings in abeyance and a second, issued December 30, 2004, denying a request from King's Chapel that she reconsider her decision.

In sum, TWS is a certified wastewater utility authorized by the TRA to provide sewer service in various locations across Tennessee. One such location is the site of a proposed subdivision ("the Subdivision") in Williamson County.¹ To serve the new development, TWS entered into a contract with the owners of the development to build and operate a wastewater treatment system on that site. Pursuant to that contract, a copy of which has been filed with the Authority, TWS has substantially completed the system and, thus far, has been paid \$250,000 by the developers, approximately one-fourth of the total contract price.

The developers, however, have refused to make any further payments for the system. Moreover, the developers now claim that they, not TWS, "constructed" the nearly completed system and that King's Chapel, not TWS, now "owns" it.² The developers have organized their own utility company, King's Chapel, and have applied to the TRA for a certificate of convenience and necessity to serve the Subdivision. King's Chapel has also asked TDEC to revoke the State Operating Permit ("SOP") previously granted to TWS and issue an SOP to King's Chapel.³

¹ TWS refers to the subdivision as "Meadowbrook." King's Chapel refers to the same subdivision as "Ashby Communities." To avoid confusion, this response will simply refer to the development as "the Subdivision."

²The applicant in this proceeding, King's Chapel, is owned by Charles Pinson, John and Elaine Powell, the three developers of the new subdivision. In the application, King's Chapel states that the TWS system was "constructed" by Ashby Communities (presumably an entity created by the developers) and that the system was then "transferred" to King's Chapel "to operate." Petition, paragraph 2. If, as the Petition claims, the system was constructed by an entity which does not have a certificate from the TRA, the developers have violated T. C. A. §65-4-201 ("[No] person or corporation not at the time a public utility shall commence the construction of any plant, line system or route to be operated as a public utility . . . without having first obtained . . . a certificate.") The knowing violation of that statute is a criminal offense, punishable by a fine of \$500 to \$1,000 for "each and every such act of violation." T. C. A. §65-3-119. See also T. C. A. §65-4-116. If the developers had, in fact, constructed the system (which they did not) they could be subject to a fine of \$1,000 for each day since the commencement of construction.

³ At this time, only TWS holds a permit from TDEC to operate the new system. No such permit may be issued to King's Chapel unless and until TDEC terminates the permit of TWS. See letter to John Powell from Edward Polk,

The developers, in essence, are attempting to steal the newly built system, along with the associated operating rights, from TWS for a fraction of the system's value. In response, TWS is vigorously opposing King's Chapel in proceedings before TDEC and the Authority. TWS has also filed suit against the developers in Williamson County Chancery Court to enforce the contract, to declare that TWS, not King's Chapel, owns the new treatment system, and to prevent the developers from engaging in a "a wrongful and unlawful conspiracy to defraud, convert and obtain the Plaintiffs' property by fraudulent and unlawful means." Complaint, paragraph 36. A copy of the Complaint is attached to the "Motion to Hold Proceedings in Abeyance."

On December 20, 2004, Williamson County Judge Donald P. Harris heard argument on a motion by King's Chapel to dismiss that part of the lawsuit which asks the Court to declare that TWS owns the treatment system. The Court denied the motion and told the attorney for King's Chapel that the ownership issue should be addressed in a motion for summary judgment. Judge Harris also commented that, based on Williamson County regulations, which require that the same entity both own and operate a sewer system, it seemed logical that the developers of the subdivision must have known that, upon completion of the treatment system, it would be both owned and operated by TWS. Following the Court's ruling, King's Chapel submitted an answer to the suit and filed a counter-claim against TWS. The parties are now engaged in discovery.

The Hearing Officer's Decision

Recognizing that the Authority cannot rule on the application of King's Chapel until (1) the Chancery Court determines who owns the treatment system and (2) TDEC decides which company will have an SOP to serve the Subdivision, the Hearing Officer concluded that the

Manager, Permit Section of the Division of Water Pollution Control and response from Sharon Jacobs, counsel for TWS, to Mr. Polk. Copies of both letters are attached to TWS's "Motion to Hold Proceedings in Abeyance."

Authority had no choice but to hold these proceedings in abeyance until these issues are determined.

The TRA has no statutory authority to resolve a property dispute or to award an SOP. Under state law, however, those questions must be resolved before the TRA can decide whether to issue a certificate to King's Chapel to serve the proposed Subdivision. As the Hearing Officer explained, the agency is prohibited by statute from granting a certificate to King's Chapel unless the agency first determines that the "existing system" of TWS is "inadequate to meet the reasonable needs of the public." See T.C.A. § 65-4-203(a). The Authority cannot make that determination until the Court determines who owns the "existing system" and which company is authorized by TDEC to operate it. As the Hearing Officer wrote (Order of December 17, 2004, at 6):

Tenn. Code Ann. § 65-4-203(a) (2004)⁹ requires the Authority to make a determination as to the adequacy of the existing facilities to meet the reasonable needs of the public before granting a certificate to a competitor. TWS asserts that the *Petition* should be evaluated pursuant to that statute and King's Chapel asserts that the statute does not apply. The Authority cannot move forward with proceedings to approve or deny King's Chapel's *Petition* until it determines whether that statute should be used to evaluate that *Petition*. However, the Authority cannot determine the applicability of Tenn. Code Ann. § 65-4-203(a) (2004) until it determines if one of the parties is an incumbent and one of the parties is a competitor pursuant to the terms of that statute. The Authority cannot determine the respective status of the parties until the Chancery Court determines who owns the sewer system and TDEC determines who will ultimately possess a state operating permit to provide service to the subdivision. Thus, the dispute over the ownership of the sewer system currently being litigated in the Chancery Court, coupled with the uncertainty over which party ultimately will possess a state operating permit from TDEC, serves to render any evaluation of the *Petition* by the Authority premature until these issues are resolved.

⁹ Tenn. Code Ann § 65-4-203(a) (2004) reads

(a) The Authority shall not grant a certificate for a proposed route, plant, line, or system, or extension thereof which will be in competition

with any other route, plant, line, or system, unless it shall first determine that the facilities of the existing route, plant, line or system or inadequate to meet the reasonable needs of the public, or the public utility operating the same refuses or neglects or is unable to or has refused or neglected, after reasonable opportunity after notice, to make such additions and extensions as may reasonably be required under the provision of this part

In response to the Hearing Officer's decision, King's Chapel filed a motion asking her to reconsider her decision. In the motion, King's Chapel did not argue that the Hearing Officer was wrong to hold these proceedings in abeyance but pleaded that the resulting delay would cause financial harm to the developers. TWS responded that the delay was entirely the result of the developers' own tactics and that construction of the Subdivision could proceed at once if the developers would simply honor their contractual obligations. After hearing these arguments, the Hearing Officer denied the motion to reconsider, explaining again that the Authority could not carry out its statutory duties until after the Chancery Court and TDEC have ruled. She wrote (Order of December 30, 2004, at 7-8):

The basis of the December 17, 2004 *Order* holding this matter in abeyance was that the Authority cannot move forward with its consideration of King's Chapel's *Petition* pursuant to Tenn. Code Ann. § 65-4-203(a) (2004) until the ownership of the sewer system is determined. That determination will be made by the Williamson County Chancery Court through the resolution of the pending suit involving the parties. In addition, there is uncertainty over which party would ultimately possess a state operating permit from TDEC. In support of its request for reconsideration of that *Order*, King's Chapel argues that the Authority should address the delay to the lot owners who cannot close on their property or begin construction until sewer service is established and should address the costs incurred as a result of that delay. Although the delay and resulting costs cited by King's Chapel are no doubt burdensome to the developers and to the lot owners or potential lot owners, King's Chapel has not demonstrated how consideration of those burdens will impact or change the Authority's ability to determine whether or how to apply the provisions of Tenn. Code Ann. §65-4-203(a) (2004) to its *Petition* so that this matter may move toward a resolution. Nor has

King's Chapel demonstrated through its filings or arguments that the analysis or conclusions contained in the *Order* are incorrect or are in need of further clarification. As a result, the Hearing Officer concludes that King's Chapel's request for reconsideration of the *Order Granting Motion to Hold Procedure in Abeyance* should be denied.

In the alternative, King's Chapel asked that the Hearing Officer allow a third party to operate the new system on an interim basis. The Hearing Officer held that the Authority had no such powers and denied the request.

The Petition for Appeal

King's Chapel now appeals the Hearing Officer's decision, arguing that "no contract exists" between TWS and the developers and that TWS "owns no route, plant, line or system" in the Subdivision. Therefore, according to King's Chapel, the TRA need not wait for the Chancery Court to decide who owns the treatment system but should go ahead and declare that King's Chapel is the owner regardless of what the Court may rule. The appeal does not address the question of whether the TRA has jurisdiction to resolve a property dispute nor does it address the pending proceedings at TDEC.

Argument

There is no basis for the Authority to overturn the Hearing Officer's ruling. First, there is no statute which allows King's Chapel to bring this appeal. Second, even if an appeal could be made, the Authority must agree with the Hearing Officer that the agency cannot act on this application until the Chancery Court and TDEC have decided which company owns the existing system and has a state permit to operate it.

First the Tennessee Uniform Administrative Procedures Act, T.C.A. § 4-5-315, authorizes a party to file an appeal from an "Initial Order" of a Hearing Officer. An "Initial Order" must contain, among other things, findings of fact and conclusions of law that dispose of

the case, one way or the other, and instructions to the parties about their rights to file administrative and judicial appeals. T.C.A. § 4-5-314(c). In this case, the Hearing Officer's decision contains no such findings or instructions. It merely holds this case in abeyance, temporarily, until other cases are resolved. It is obviously not intended to be an "Initial Order" and, for that reason, makes no mention of any appeals. The order is an interlocutory, procedural decision and, therefore, not appealable under the UAPA. King's Chapel does not cite any statute or case precedent authorizing the appeal of an interlocutory ruling by a Hearing Officer. In the absence of any such authority, King's Chapel has no right to bring this appeal.

Second, even if an appeal could be brought, the Hearing Officer's ruling was clearly correct and, indeed, the only logical decision she could have made.

This dispute between TWS and the developers is, at bottom, a contractual dispute that has nothing directly to do with the provision of utility service. Only a court can determine the legitimacy of the contract, what the developers owe for the construction of the system, and who has legal title to the system's assets. The TRA has no statutory authority to address such issues.

As Tennessee courts have repeatedly held, the TRA "must conform its actions to its enabling legislation . . . It has no authority or power except that found in the statutes." BellSouth v. Greer, 972 S.W.2d 663 (Tenn.App. 1997).⁴ There is, of course, no statute, and King's Chapel has pointed to none, which gives the TRA power to resolve a contractual dispute between a utility and a developer, much less to determine which entity owns the assets of the system.

⁴ See also Pharr v Nashville C & St L Ry, 208 S.W.2d 1013 (Tenn. 1948) (finding that the Public Service Commission can exercise no authority that is outside or beyond the express provision of the statute), Tennessee Public Service Comm'n v Southern Ry Co., 554 S.W.2d 612, 613 (Tenn. 1977) (if Legislature intended PSC to have authority to insure the safety of the public in crossing a railroad right-of-way, it would have done so explicitly because "[a]ny authority exercised by the Public Service Commissions must be as the result of an express grant of authority by statute or arise by necessary implication from the expressed statutory grant of power").

There is no statutory grant of power, express or implied, to the TRA to address all the underlying issues which must be resolved before this application can go forward.

Legally, TWS retains the exclusive right to provide service to the Subdivision. TWS cannot be deprived of that right except by the TRA, acting pursuant to T. C. A. §65-4-203(a). As previously discussed, the Hearing Officer has recognized that the Authority cannot meaningfully determine how to apply that statute to this case until the Chancery Court determines who owns the system. If, as TWS contends, TWS owns this system, then TWS clearly has facilities in place which are adequate to provide the requested service and Section 203(a) prohibits the TRA from authorizing anyone else, on either a permanent or temporary basis, to serve that Subdivision. Thus, until the ownership issue is resolved, the TRA cannot act on the pending application of King's Chapel.⁵

While it is regrettable that the developers' project has been delayed, the delay is due entirely to their own refusal to abide by their contract with TWS. TWS is obviously competent to build and operate the system and stands ready to begin providing service as soon as the developers fulfill their contractual obligations. But, like any other utility, TWS is not obligated to provide service for free or for less than the agreed-upon amount. TWS should not be stripped of its statutory rights simply because the developers state that they are in financial trouble.

Conclusion

The contractual dispute pending before Judge Harris and the proceedings at TDEC are not matters within the TRA's jurisdiction. Any financial harm to the developers arising out of


⁵ Even if the TRA issued some kind of "interim" certificate to another utility, a remedy not authorized by any TRA statute, it seems unlikely that Williamson County would allow the developers to begin selling lots. As TWS has previously noted (Motion to Hold Proceedings in Abeyance, at footnote 5), Williamson County rules require that the same entity both own and operate a wastewater system. Therefore, it appears from the letter written by the attorney for the Williamson County Planning Commission that she will not recommend that the Commission approve the final platt for this development until the ownership issue is resolved by the Court. (A copy of her letter is attached to the "Motion to Hold Proceedings in Abeyance.")

the delay caused by these proceedings, both of which are the direct result of the developers' own decisions, is neither the fault of the TRA nor the responsibility of this agency to fix. The agency should not, and legally cannot, predetermine the issues of system ownership and the award of an SOP but must await until TDEC and the Chancery Court have ruled.

The Hearing Officer's decision was correct and should be affirmed.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 
Henry M. Walker (No. 00272)
414 Union Street, Suite 1600
P.O. Box 198062
Nashville, Tennessee 37219
(615) 252-2363

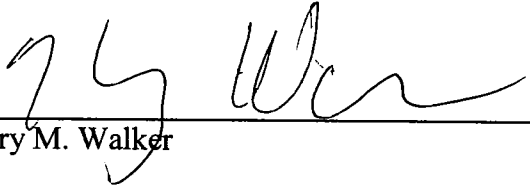
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being forwarded via U.S. mail, postage prepaid, to:

Richard Militana
Militana & Militana
5845 Old Highway 96
Franklin, TN 37064

Charles B. Welch, Jr.
Farris, Mathews, Branan, Bobango, Hellen & Dunlap, PLC
Historic Castner-Knott Building
618 Church Street, Suite 300
Nashville, TN 37219

on this the 19th day of January 2005.



Henry M. Walker